Malayan Banking Bhd v Joseph Vijay Kumar a/l A Arulnathan

HIGH COURT (SHAH ALAM) — SUIT NO 22–212 OF 2004
SURAYA OTHMAN J
14 FEBRUARY 2011

Evidence — Adverse inference — Failure of defendant to testify on own behalf — No good reason for defendant's absence at trial — No evidence adduced for defendant — Whether adverse inference against defendant should be drawn — Whether evidence adduced by plaintiff presumed to be true — Evidence Act 1950 s 114(g)

The defendant was sued as guarantor in respect of banking facilities granted by the plaintiff to a company. Apart from the guarantee, the facilities were secured by the absolute assignment of the company's property to the plaintiff. Upon the company's default in making repayments under the facilities agreement, the plaintiff auctioned the assigned property and after crediting the proceeds from the auction, claimed for the balance owing. At the trial, the plaintiff called only one witness ('PW1'). The defendant failed to attend the trial and no witnesses testified on his behalf. His counsel, however, submitted that the plaintiff had failed to produce proof of posting of any letter of demand to the defendant in order to trigger his liability. Counsel also submitted the court should not accept the plaintiff's certificate of indebtedness as conclusive as there was a manifest error on its face. The plaintiff submitted that the defendant's pleading was a bare denial of the claim and the objections taken by his counsel at the trial concerning service of the letters of demand and variations of interest imposed on the banking facilities had not been pleaded.

Held, allowing the claim with costs:

(1) The plaintiff's claim stood unchallenged and therefore PW1's evidence ought to be presumed to be true and be accepted. Section 114(g) of the Evidence Act 1950 was invoked to draw an adverse inference against the defendant since he was unable to give a good reason why he did not attend court to defend his case (see para 27).

(2) PW1 provided convincing documentary evidence particularly with reference to how the outstanding balance and interest thereon was calculated. She showed the court how the calculations were arrived at by referring to the certificate of indebtedness. Evidence was also led by her that the three letters of demand were in fact sent to the guarantors, including the defendant's solicitor (see para 25).

(3) As the defendant did not attend court to defend his case and his counsel

could not show any manifest error on the face of the certificate of indebtedness produced by PW1, her evidence stood unchallenged and the court accepted the certificate as conclusive evidence of the defendant's indebtedness to the plaintiff (see para 31).

[Bahasa Malaysia summary

Defendan disaman sebagai penjamin berkaitan kemudahan-kemudahan perbankan yang diberikan oleh plaintif kepada sebuah syarikat. Selain daripada jaminan, kemudahan-kemudahan tersebut dijamin oleh penyerahhakkan mutlak hartanah syarikat kepada plaintif. Atas keingkaran syarikat dalam membuat pembayaran di bawah perjanjian kemudahan-kemudahan, plaintif melelong hartanah tersebut dan mengkredit keuntungan daripada lelongan tersebut, menuntut untuk baki yang belum dibayar. Pada perbicaraan, plaintif memanggil hanya seorang saksi ('PW1'). Defendan gagal untuk menghadiri perbicaraan dan tiada saksi-saksi memberi keterangan bagi pihaknya. Peguamnya, walau bagaimanapun, berhujah bahawa plaintif gagal untuk mengemukakan bukti mengepos apa-apa surat tuntutan kepada defendan untuk mencetus liabilitinya. Peguam juga berhujah mahkamah tidak patut menerima sijil keberhutangan plaintif sebagai konklusif memandangkan terdapat kesilapan yang jelas pada dasarnya. Plaintif berhujah bahawa pliding defendan adalah penafian sahaja terhadap tuntutan tersebut dan bantahan-bantahan yang dibuat oleh peguamnya pada perbicaraan berkaitan penyerahan surat-surat tuntutan dan pelbagai faedah yang dikenakan atas kemudahan-kemudahan perbankan tidak diplid.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Tuntutan plaintif kekal tidak dicabar dan oleh itu keterangan PW1 patut dianggap benar dan diterima. Seksyen 114(g) Akta Keterangan 1950 dibangkitkan untuk menarik inferens bertentangan terhadap defendan memandangkan dia tidak dapat memberi alasan bagus mengapa dia tidak hadir mahkamah untuk membela kesnya (lihat perenggan 27).

(2) PW1 memberikan keterangan dokumentar yang meyakinkan terutamanya merujuk kepada bagaimana baki yang belum dibayar dan faedah daripadanya dikira. Dia menunjukkan kepada mahkamah bagaimana pengiraan tersebut dicapai dengan merujuk kepada sijil keberhutangan. Keterangan juga diberi olehnya bahawa tiga surat tuntutan yang sebenarnya dihantar kepada penjamin-penjamin, termasuk peguam defendan (lihat perenggan 25).

(3) Memandangkan defendan tidak hadir ke mahkamah untuk membela kesnya dan peguamnya tidak dapat menunjukkan apa-apa kesilapan yang jelas terhadap sijil keberhutangan yang dikemukakan oleh PW1,

keterangan kekal tidak dicabar dan mahkamah menerima sijil tersebut sebagai keterangan konklusif mengenai keberhutangan defendan kepada plaintif (lihat perenggan 31).]

Notes

For cases on adverse inference, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 160–312.

Cases referred to

Arab-Malaysia Merchant Bank Bhd v Silver Concept Sdn Bhd [2008] 6 MLJ 295, HC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)

Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors [2008] 4 MLJ 448, HC (refd)

D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & Ors [1990] 2 CLJ 58, HC (refd)

Jaafar bin Shaari & anor (suing as Administrator of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627; [1996] 4 CLJ 1, CA (folld)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

MBf Finance Bhd v Tiong Kieng Seng [2001] MLJU 405; [2001] 4 CLJ 38, HC (refd)

Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ (Rep) 585, HC (refd)

RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors [2008] 3 MLJ 130, HC (refd)

Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) anor [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (folld)

United Malayan Banking Corp v Chen Yin Khee & Ors [2005] 2 MLJ 118, CA (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Suit No 22–212 of 2004 (High Court, Shah Alam).

Nad Sagaram (Irene Wong with him) (Shearn Delamore & Co) for the plaintiff.
Sakhty Vell Saminathan (Prasad Abraham Associates) for the defendant.

Suraya Othman J:

INTRODUCTION

[1] The plaintiff's case against the defendant is a claim for the outstanding sum due and owing under the banking facilities amounting to RM503,173.78 as at 11 August 2010 and interest on the sum of RM503,173.78 plus continuing interest thereon at the rate of 2.5%pa ('pa') above the plaintiff's base lending rate plus penalty interest at the rate of 1%pa from 12 August 2010 to the date of full settlement.

FACTS AND BACKGROUND

[2] By a loan agreement cum assignment dated 13 May 1997 read together with the letter of application for preferred property loan dated 25 March 1997 ('the loan agreement'), Allied Bank (Malaysia) Bhd granted banking facilities of RM300,000 ('said banking facilities') to Laranda Holdings Sdn Bhd ('the borrower') in accordance to the agreed terms stated in the loan agreement.

[3] As security for the said banking facility, all benefits, title and interest of parcel unit No F03/06, Block F Phileo Damansara Selangor bearing the the postal address at 'unit No 7-03, Block F, Phileo Damansara 1, Off Jalan Damansara, 46350 Petaling Jaya, Selangor Darul Ehsan' ('the said property') belonging to the borrower were assigned absolutely to the plaintiff. The borrower also executed a power of attorney dated 16 April 1997 in respect of the same.

[4] It was, inter alia, a term of the loan agreement that:

(a) in consideration of the plaintiff granting the borrower the banking facilities, the borrower agreed to pay on demand all monies now or from time to time are due and owing to the plaintiff, in respect of the loan agreement;

(b) the borrower agree to pay the plaintiff interest in accordance with the second schedule of the loan agreement;

(c) the plaintiff is entitled at any time to vary at its discretion the rate of interest chargeable by serving a notice on the borrower; and

(d) the plaintiff may at time and without in any way affecting the validity of the securities, liabilities and obligations, determine vary or increase the

banking facilities granted, grant the borrower any time or indulgence or release, modify or abstain from perfecting or enforcing any or rights.

[5] The interest rate was varied from BLR + 1.6%pa to BLR + 2.6%pa by way of notification to the borrower via a letter dated 27 February 1998. Subsequently, the plaintiff revised the interest rate down to BLR + 2.5%pa pursuant to a Bank Negara's guideline.

[6] The terms of the guarantee also specifies that:

(a) the defendant will pay to the plaintiff on demand all monies and discharge all obligations and liabilities whether actual or contingent now or hereafter due and owing or incurred by the borrower;

(b) the guarantee shall not be considered as satisfied by any intermediate payment or satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be a continuing security and shall extend to cover the ultimate balance from time to time owing to the plaintiff by the borrower;

(c) a statement signed by the plaintiff's manager or any officers as to the monies and liabilities for the time being due or incurred to the plaintiff from or by the borrower shall be final and conclusive evidence against the defendant of the indebtedness of the borrower to the plaintiff for all purposes including legal proceedings; and

(d) any demand for payment and/or other demand or notice under the guarantee may be made by the plaintiff's manager or any officer or by any person or firm for the time being acting as the plaintiff's solicitor by letter sent by post addressed to the defendant at the address specified in the guarantee or the last known place of residence.

[7] It was also agreed that the guarantee shall be without prejudice to and shall not be effected nor be released or exonerated by:

(a) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment or other security and whether satisfied by payment or not;

(b) the granting of any other banking facility or facilities to the borrower and or variation of the banking facilities granted to the borrower including the substitution addition increase or reduction of the banking facilities;

(c) any release or discharge given to any one or more coguarantors whether with or without our consent or notice; and

(d) where the guarantee is signed by more than one person, any liability arising under this guarantee shall be deemed to be the joint and several liability of such persons.

[8] The borrower failed to make payment of the sums due under the loan agreement when a demand was made through the plaintiff's solicitors to recall the facility on 19 March 1998. However notwithstanding the demands made, the defendants failed, refused and neglected to make payment of the sums due of RM484,940.99 as at 31 March 2002 and remains indebted to the plaintiff for the said sum with continuing interest.

[9] On 31 March 1998, the plaintiff auctioned the said property through a public auction to Noble Haus (M) Sdn Bhd for the sum of RM329,500 ('the first auction') in its attempt to recover the sum due and owing under the banking facilities. However, the first auction was successfully avoided by Noble Haus (M) Sdn Bhd due to an error in the description of the said property in the proclamation of sale. The said property was erroneously described as 'Office Lot 603, 6th Floor, Block F, Pusat Dagangan Phileo Damansara 1, Jalan Damansara, Petaling Jaya, Selangor Darul Ehsan' instead of 'Unit NO F03/06, Block F, Phileo Damansara 1, Selangor' or 'Unit No 7-03, Block F, Phileo Damansara 1, Off Jalan Damansara, 46350 Petaling Jaya, Selangor Darul Ehsan'.

[10] In light of the above, Noble Haus (M) Sdn Bhd commenced an action against the plaintiff herein, namely Kuala Lumpur Suit No S3(S2)–366 of 2000 seeking for, inter alia, a declaration that there is no agreement between Noble Haus (M) Sdn Bhd and the plaintiff for the sale of the property.

[11] By virtue of the Kuala Lumpur High Court order dated 12 February 2001 declaring that there is no sale and purchase agreement between Noble Haus (M) Sdn Bhd and the plaintiff herein, the first auction was avoided by Noble Haus (M) Sdn Bhd.

[12] After the first auction, there were several other auctions but there were no successful bidders. It was only on 8 January 2004 that the plaintiff succeeded in auctioning the said property through a public auction pursuant to the loan agreement ('the said auction') for the price of RM406,125.

[13] The payments were received by the plaintiff from the said auction and the particulars are as follows:

(a) RM40,612.50 (10% deposit) was credited into the account on 12 January 2004; and

(b) RM365,512.50 (balance purchase price) was credited into the account on 21 April 2004.

[14] As for the certificate of indebtedness, P1, dated 11 August 2010, the amount owing as at 11 August 2010 is as follows:

Amount owing as at 31.3.2002	RM 484,940.99
Total interest and overdue interest from 1.4.2002 to 11.8.2010.	RM 311,274.73
Auctioneer fees and charges related to the auction.	RM 4,027.83
Miscellaneous charges imposed by the Developer	RM 93,623.45
Quit rent and assessment	RM 14,263.33
Other charges	RM 1,168.45
	RM 909,298.78
Minus:	
Amount received from the auction	RM 406,125.00
Amount Owing as at 11 August 2010	RM 503,173.78

THE PLAINTIFF'S SUBMISSION

[15] As regard to the issue of service of the letters of demand, Mr Nad Segaram, the plaintiff's solicitor submitted that the plaintiff by their solicitors' letters dated 19 March 1998, 9April 2002 and 21 May 2002 demanded the sums due and owing from the defendant pursuant to the terms of the guarantee. During cross-examination of the plaintiff's witness, the defendant sought to challenge the service of the plaintiff's letters of demand dated 19 March 1998 to the borrower and to the defendant himself. Upon scrutinising the defendant's amended defence, the defendant did not plead that he did not receive the letter of demand but only raise a defence of bare denial. Therefore, the defendant cannot now raise the issue of non-service of the letters of demand as it has failed to plead the same in his amended defence. The defendant is thus bound by his own pleadings (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428). Furthermore, the defendant has also failed to produce any witness or documentary evidence to show that he did not receive the said letter of demand dated 19 March 1998.

[16] Mr Nad Segaram further submitted that cl 46 of the loan agreement clearly provides that a notice of demand shall be deemed sufficiently served on the borrower if it is sent by ordinary mail and service shall be deemed to be made 48 hours after posting notwithstanding that it is undelivered or returned undelivered and in proving such service it shall be sufficient to prove that the

notice was properly addressed and posted. Clause 13 of the guarantee also provides that a demand or notice sent by post shall be deemed to have been served four business days following the day on which it is posted and in proving such service it shall be sufficient to prove that the notice or demand was properly addressed and posted notwithstanding that the said notice or demand may subsequently be returned undelivered. Therefore, the plaintiff contended that both the letters of demand were posted and sent to the borrower and the defendant respectively and without any evidence proving to the contrary, it should be deemed unchallenged and accepted. Hence, the service of the letters of demands dated 19 March 1998 to the borrower and the defendant are good service.

[17] On the issue of notification of the variation of interest rate, Mr Nad Segaram submitted that the interest rate was varied from BLR + 1.6%pa to BLR + 2.6%pa effective on 28 February 1998 and the borrower was duly notified of this variation vide a letter dated 27 February 1998. The interest rate was subsequently revised down to BLR + 2.5%pa pursuant to Bank Negara's guideline. Mr Nad Segaram further stated that during the cross-examination of the plaintiff's witness, the defendant has sought to challenge the notification of variation of the interest rate which were not pleaded by the defendant in his amended defence. In any event it was proven that the borrower was duly notified of the first variation of the interest rate from BLR + 1.6% to BLR + 2.6% as evidenced from the letter dated 27 February 1998 and as testified by the plaintiff's witness herself. furthermore, the defendant's amended defence did not challenge the variation of the interest rate and thus the defendant ought not to be allowed to raise this issue now for he is bound by his own pleadings. Mr Nad Segaram referred to the cases of *Lee Ah Chor v Southern Bank Bhd* and *Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1 in support of his contention.

[18] On the issue of the certificate of indebtedness, it was argued that by virtue of cl 12 of the guarantee, the defendant has agreed that a statement signed by any officer of the plaintiff as to the monies and liabilities for the time being due or incurred from or by the borrower shall be final and conclusive evidence against the defendant of the indebtedness of the borrower to the plaintiff for all purposes including legal proceedings. Therefore, the certificate of indebtedness dated 11 August 2010 (P1) is conclusive evidence of the defendant's indebtedness to the plaintiff. He further argued that it is trite law that a certificate of indebtedness shall be conclusive proof of indebtedness until and unless there is a manifest error shown. The cases of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282; *D & C Nomura Merchant Bankers Bhd v Gunung Kuari Sdn Bhd & Ors* [1990] 2 CLJ 58; *RHB Bank Bhd v Tan Swee Long Holdings Sdn Bhd & Ors* [2008] 3 MLJ 130; *Arab-Malaysia*

Merchant Bank Bhd v Silver Concept Sdn Bhd [2008] 6 MLJ 295; and *Danaharta Managers Sdn Bhd v Melewar Leisure Sdn Bhd & Ors* [2008] 4 MLJ 448, were referred to support this contention.

THE DEFENDANT'S SUBMISSION

[19] The defendant's solicitor, Mr Sakthy Veil Saminathan submitted that the plaintiff's certificate of indebtedness, P1, dated 11 August 2010 clearly showed manifest error on the face of it. He submitted that the court should note that the plaintiff's witness, Cik Nor Lida bt Raja Omar during cross-examination has admitted that upon receipt of the proceed of sale from the third party, it becomes the bank's duty to first offset the amount due and owing and thereafter claim for the balance. Instead Cik Nor Lida was unable to inform the court the balance sum that was due and owing as at 21 April 2004 after deducting the proceed of sale of RM406,125. Therefore Mr Sakthy Veil submitted there is no evidence before this court as to what was the actual amount due and owing after deducting the proceed of sale received on 21 April 2004 and as such the certificate of indebtedness showed manifest error on the face of it. In this regard, Mr Sakthy Veil referred to the cases of *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363, *United Malayan Banking Corp v Chen Yin Khee & Ors* [2005] 2 MLJ 118; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532; and *Oriental Bank Bhd v Jaafar Sidek Mohd Salam & Ors* [1990] 2 CLJ (Rep) 585 to support his contention that the certificate of indebtedness is no longer conclusive.

[20] Encik Sakthy Vell further argued that the plaintiff failed to produce the proof of posting of the plaintiff's letter of demand. As the liability of the guarantors only arises when the demand was made and the service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim, the failure of the plaintiff to show proof of posting resulted in them not being able to rely on the presumption of service. The cases of *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532 and *MBf Finance Bhd v Tiong Kieng Seng* [2001] MLJU 405; [2001] 4 CLJ 38 were referred to in support.

ISSUES TO BE TRIED

[21] The issues to be tried in this case are:

(a) whether the letters of demand has been served on the borrower and the defendant;

(b) whether the borrower and the defendant has been notified of the variation of the interest rate.

(c) whether the certificate of indebtedness, P1, is conclusive proof of the defendant's indebtedness to the plaintiff; and

(d) whether there is any manifest error shown on the face of P1. Whether there is any error in the calculation of P1.

DECISION OF THE COURT

[22] In arriving at a decision on the plaintiff's claim, I have cautiously examined the evidence adduced by the plaintiff as well as the documents tendered and relied upon by both parties. I have also considered the written submissions and authorities submitted.

[23] The plaintiff called only one witness, PW1, Cik Nor Lida bt Raja Omar who is the Head of Group 1 Remedial/Asset Reconstruction 3, Corporate Remedial Management of the plaintiff.

[24] The learned counsel for the defendant, Mr Sakthy Vell informed the court that the defendant had no case to present because the defendant, Mr Joseph Vijay Kumar a/l Arulnathan was not in attendance in court since he is presently in Europe. In this circumstance, learned counsel was aware that he had an uphill task since his failure to call evidence will lead to the presumption that all the evidence led by the plaintiff must be assumed to be true. This principle was held in the case of *Jaafar bin Shaari & anor suing as Administrator of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509. In this case the court held that once a defendant in a civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[25] Reverting back to the plaintiff's witness, PW1 provided convincing documentary evidence, particularly with reference as to how all the outstanding balance and interest thereon was calculated. PW1 in particular showed this court how the calculations were arrived at by referring to a certificate of indebtedness, P1, dated 11 August 2010. Evidence was also led by her that the three letters of demand were in fact sent to the guarantors, including the defendant's solicitor. Her evidence was not challenged by the defendant who did not give evidence. In this regard, the plaintiff's counsel Mr Nad Sagaram is correct to quote the principle in *Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627; [1996] 4 CLJ 1. In this case the appellant had failed to secure the presence of a witness in court to give testimony of the oral promise allegedly made by the witness to sell a particular property. The Court of Appeal held unanimously that the burden of proof lies

with the appellant to produce the said witness to prove its allegation and when it failed to produce the said witness to tender evidence in support, it has thus failed to discharge its burden of proof.

[26] In this regard, I am also guided by the Federal Court's case in *Takako Sakao (f) v Ng Pek Yuen (f) anor* [2010] 2 MLJ 181; [2010] 1 CLJ 381. In this case no evidence was called for by the respondent and the Federal Court held that:

> In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant o*ught to be presumed to be true* …
>
> The second consequence is that the *court ought to have drawn an adverse inference against the first respondent* … Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give reasons the court will draw an adverse inference … (at pp 398–399).

[27] Applying the principle above to our present case, the plaintiff's claim stood unchallenged and therefore the evidence of PW1 ought to be presumed to be true and accepted. Section 114(g) of the Evidence Act 1950 is invoked to draw an adverse inference against the defendant since the defendant was unable to give good reasons why he did not attend court to defend his case.

[28] Apart from that, it is to be noted that this case rest on cl 12 of the guarantee which clause the parties have agreed to. Clause 12 states that:

> A statement signed by the Plaintiff's manager or any officers as to the monies and liabilities for the time being due or incurred to the Plaintiff from or by the Borrower shall be final and conclusive evidence against the Defendant of the indebtedness of the Borrower to the Plaintiff for all purposes including legal proceedings.

[29] The question then arose how conclusive is the certificate of indebtedness. The position of a certificate of indebtedness has been so well defined«and settled so as to be trite law. A clause such as cl 12 above has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid as established by the decision in *Citibank NA v Ooi Boon Leong & Others* [1981] 1 MLJ 282 where Raja Azlan Shah CJ (Malaya), (as he then was), said at p 284:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents … It means that, for the

purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate: see *Dobbs v National Bank of Australasia Ltd* [1935] 53 CLR 643; *Bache & Co v Banque Vernes* (1973) 2 LlL Rep 437.

[30] The principle enunciated above was also decided in the case of *Cempaka Finance Bhd v Ho Lai Ying & Anor* [2006] 3 CLJ 544, where His Lordship, Steve Shim CJ (Sabah & Sarawak), held that:

> A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed.

[31] As the defendant did not attend court to defend his case, and his counsel, Mr Sakthy Vell Saminathan could not show any manifest error on the face of the certificate of indebtedness, P1, produced by PW1, Cik Nor Lida bt Raja Omar, her evidence stood unchallenged and this court accepted the said certificate as conclusive evidence of the defendant's indebtedness to the plaintiff.

CONCLUSION

[32] Therefore, in answer to the four issues raised, the answers to the first three issues are in the positive and the fourth issue in the negative:

(a) the letters of demand dated 19 March 1998 were served on the borrower and the defendant and are deemed good service;

(b) the borrower and the defendant were notified of the variation of the interest rate as per letter dated 27 February 1998 from the plaintiff and are thus bound by it;

(c) the certificate of indebtedness, P1, is conclusive proof of the defendant's debt and liability toward the plaintiff; and

(d) the defendant failed to show any manifest error on the face of the certificate of indebtedness, PL the calculation of P1 by PW1 is accepted as correct by this court.

[33] In these circumstances, the plaintiff's claim for RM503,173.78 as shown in P1 is allowed. The interest on the sum of RM503,173.78 plus continuing interest thereon at the rate of 2.5%pa above the plaintiff's base lending rate plus penalty interest at the rate of 1%pa are also allowed from 12 August 2010 to the date of full settlement. Costs to the plaintiff is also allowed at RM3,000.

[34] The plaintiff's claim is allowed with costs.

Claim allowed with costs.

Reported by Ashok Kumar